Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6

ERIN ROBERT RUSSELL, PETITIONER

V.

HENRY E. COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

John D. Miller
MILLER, TAYLOR AND BURLEW
218 Masonic Building
227 St. Ann Street
Owensboro, Kentucky 42301

Telephone: (502) 926-2621

Counsel for Petitioner

Unigraphic, Inc., 1401 N. Fares Ave., Evansville, Ind. 47711, Phone 424-3680

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PETITION FOR WRIT OF CERTIORARI
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FOR THE SIXTH CIRCUIT

The petitioner, Erin Robert Russell, prays that a writ of certiorari issue to review the order the United States Court of Appeals for the Sixth Circuit entered on April 21, 1977, affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

(1) The Opinion and Judgment of the Daviess County, Kentucky, Circuit Court, denying relief and dismissing petitioner's petition under R. Cr. 11.42 and C. R. 60.02 (Appendix 1a)

(2) Memorandum Opinion Per Curiam of the Court of Appeals of Kentucky (then Kentucky's highest court), affirming (Appendix 3a).

(3) Memorandum Opinion and Judgment of the

United States District Court for the Western District of Kentucky, finding petitioner's claims to be without merit, dismissing and removing the action from the docket (Appendix 4a).

(4) Order of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court (Appendix 16a).

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on April 21, 1977. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. The order of the Sixth Circuit, in affirming the United States District Court for the Western District of Kentucky, is clearly in defiance of established rule of this Court as enunciated in *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972), and *Berry v. City of Cincinnati, Ohio*, 414 U.S. 29, 94 S. Ct. 193 (1973). Said order of the Sixth Circuit affirms the practice of the Kentucky state court in the use of prior, uncounselled misdemeanors in impeaching a defendant, supporting his conviction, and enhancing his punishment; all resulting in "loss of liberty".

2. This case presents a clear opportunity for this Court to determine the scope of the *Argersinger - Berry* rule, and to determine whether said rule shall be co-extensive with *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963) in regard to the collateral use of "uncounselled convictions".

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The statutory provisions involved are as follows:

Kentucky Revised Statute (hereinafter referred to as K.R.S.) 431.190 provides:

> Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

K.R.S. 243.020 (1) provides:

> No person shall do any act authorized by any kind of license with respect to the manufacture, storage, sale, purchase, transporting or other traffic in alcoholic beverages unless he holds the kind of license that authorizes such act.

K.R.S. 243.990 (2) provides:

> Any person who, by himself or through an-

other, directly or indirectly, violates subsection (1) of K.R.S. 243.020 shall, for the first offense, be fined not less than one hundred (100) nor more than two hundred dollars ($200), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; for the second offense he shall be fined not less than two hundred (200) nor more than five hundred dollars ($500), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; and for the third and each subsequent offense, he shall be fined not less than five hundred (500) nor more than five thousand dollars ($5,000), or be imprisoned in the penitentiary for not more than five (5) years, or both.

STATEMENT OF CASE

Petitioner, Erin Robert Russell, is serving a life sentence in the Kentucky State Penitentiary. His sentence was imposed under K.R.S. 431.190 as an habitual criminal, by the Daviess County, Kentucky, Circuit Court, on May 21, 1974. The sentence grew out of a single-phase trial, wherein the petitioner was found guilty by a jury. That jury also found the petitioner as having been convicted of two prior felonies. As a consequence, his sentence was fixed by this same jury at life imprisonment as an habitual criminal under the aforesaid K.R.S. 431.190. Judgment was entered accordingly.

Petitioner has heretofore attacked this life sentence in the Daviess County, Kentucky, Circuit Court; the Kentucky Court of Appeals (then the state's highest court); the United States District Court for the Western District of Kentucky; and the United States Court of Appeals for the Sixth Circuit; on the basis that one of the prior felony convictions upon which his life sentence is based was, itself, tainted under the doctrine of *Argersinger - Berry, supra,* through the collateral use of prior uncounselled misdemeanor convictions ultimately resulting in loss of liberty to the petitioner.

The Daviess Circuit Court (trial court) denied the petitioner relief, on the basis that *Argersinger - Berry* do not apply "Collaterally". The Kentucky Court of Appeals affirmed in a Memorandum Opinion Per Curiam.

The United States District Court for the Western District of Kentucky, in a petition for habeas corpus relief (Title 28 U.S.C. § 2241-2254), denied petitioner relief, without reaching the *Argersinger - Berry* question.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States District Court for the Western District of Kentucky, denying habeas corpus relief on the grounds that petitioner had "waived" his *Argersinger - Berry* rights in 1965.

It is, and has been, the contention of the petitioner that his 1965 felony conviction for the third offense of selling alcoholic beverages without a license (bootlegging on Sunday), although itself counselled, was constitutionally flawed for reason that pursuant to the Kentucky "bootlegging" recidivist statute the two prior misdemeanor convictions, although not themselves resulting in petitioner's imprisonment, were uncounselled. In short, the sequence of events is as follows:

1. In 1963, the petitioner was convicted and fined $100.00 for violating K.R.S. 243.020 (1) (bootlegging on Sunday), in the City of Owensboro, Daviess County, Kentucky, Police Court, upon a plea of guilty. This conviction was uncounselled.
2. In 1964, the petitioner was convicted of the *second offense* under the aforesaid statute; and was fined $200.00 under the provisions of K.R.S. 243.990 (2), on a plea of guilty. This conviction was also uncounselled.
3. In 1965, the petitioner was convicted of the *third offense* of violating K.R.S. 243.020 (1) (a felony, pursuant to K.R.S. 243.990 [2])

with the aid of counsel. In this conviction, the two prior uncounselled convictions were considered by the jury to support the third offense, which was enhanced into a felony and resulted in the petitioner being imprisoned.

4. In 1974, the petitioner was charged with the offense of murder, in the Daviess County, Kentucky, Circuit Court, there being alleged in the indictment two prior felony convictions, *one of which was the 1965 conviction for the third offense of selling alcoholic beverages without a license.* (In addition, during this trial the petitioner was impeached by the use of a 1945 uncounselled misdemeanor conviction.) In this single-phase trial, petitioner was found guilty by the jury of voluntary manslaughter (a lesser degree of the primary charge, under Kentucky law); and the jury, in consideration of the two prior felony convictions, fixed his punishment at life imprisonment, in accordance with K.R.S. 431.190. Petitioner has insisted throughout, that one of the prior felony convictions, to wit: the 1965 conviction for the third offense of selling alcoholic beverages without a license, was constitutionally tainted, in that same was, itself, based upon the 1963 and 1964 "uncounselled" misdemeanor convictions.

The petitioner has maintained throughout, that the aforesaid proceeding violates the *Argersinger - Berry* doctrine, in that he is now suffering a "loss of liberty" as the result of "appearing in court without counsel", albeit an indirect and collateral result of his uncounselled court appearances in 1963 and 1964. Petitioner has consistently taken reference to a condemnation of the collateral use of uncounselled felony convictions. See, *Gideon v. Wainwright, supra,* and *Burgett v. Texas,* 289 U.S. 109, 88 S. Ct. 258 (1967), and *Loper v. Beto,* 405

U.S. 473, 92 S. Ct. 1014 (1972).

The Daviess Circuit Court (the trial court), the Court of Appeals of Kentucky (then Kentucky's highest court), the United States District Court for the Western District of Kentucky, and the United States Court of Appeals for the Sixth Circuit, have refused to apply the *Argersinger* doctrine (misdemeanor cases) in the manner in which the *Gideon* doctrine (felony cases) was applied, so as to prevent the collateral use of uncounselled misdemeanor convictions in impeaching during trial, supporting a conviction, and enhancing punishment, all of which collateral uses were suffered by the petitioner in his trial and conviction, and all of which uses have been complained of in the trial court, the Court of Appeals of Kentucky, the United States District Court for the Western District of Kentucky, and the United States Court of Appeals for the Sixth Circuit, without avail.

REASONS FOR GRANTING WRIT

This case presents a clear opportunity for the Court to determine whether or not the *Argersinger - Berry* rule prohibits collateral use of uncounselled misdemeanors in causing a "loss of liberty".

In 1972, *Argersinger* condemned "loss of liberty" without the aid of counsel. In 1973, *Berry* determined that *Argersinger* was to be retroactively applied. It is manifest that the *Berry* decision would have little import unless it is to be interpreted as preventing collateral use of uncounselled misdemeanor convictions. Indeed, the precise value of *Berry* is to other situations as offered by this petition, where the loss of liberty is still being suffered, albeit as a collateral result of the uncounselled misdemeanor convictions.

Your petitioner was convicted of an uncounselled misdemeanor in 1963; however, he did not lose his liberty. In 1964, he was convicted a second time of an uncounselled misdemeanor, without a loss of liberty. However, in 1965, upon a felony charge based upon the two prior uncounselled

misdemeanor convictions, the petitioner, with the aid of counsel, was convicted of a felony. This 1965 felony conviction was used to enhance the petitioner's 1974 conviction into life imprisonment.

To hold, as the Sixth Circuit did, that the petitioner waived his *Argersinger - Berry* right in 1965 when he appeared with counsel, is unrealistic, since there was no right to counsel in misdemeanors in Kentucky in 1963 and 1964, or indeed, prior to *Argersinger* in 1972. It is true that under Kentucky law, the right to counsel in felony cases predated *Gideon*. See *Gholson v. Commonwealth*, 308 Ky. 82, 212 S.W. 2d 537 (1948). However, the requirement of counsel in misdemeanor cases was not present in Kentucky until mandated by the Federal judiciary in *Argersinger*.

CONCLUSION.

There is no logical reason why *Argersinger - Berry* should not be given the same collateral effect as the *Gideon* doctrine. Indeed, it is arguable that the credibility of uncounselled misdemeanor convictions is much less than that of uncounselled felonies. Thus, if such convictions are to be used in a collateral manner to affect a loss of liberty, it will have an immeasurable effect upon eroding the Sixth Amendment rights of the people.

The writ should issue from this Court, directing a review of this cause.

Respectfully submitted,

S/John D. Miller

John D. Miller
MILLER, TAYLOR AND BURLEW
218 Masonic Building
227 St. Ann Street
Owensboro, Kentucky 42301

June 28, 1977

CERTIFICATE OF SERVICE

Pursuant to Rule 33 (1) and (3) (b), of the Rules of the Supreme Court of the United States, I certify that three true and exact copies of the foregoing Petition for a Writ of Certiorari were mailed to the Hon. Guy C. Shearer, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601 (he being counsel of record for the respondent), with proper postage attached thereto, on this 29th day of June, 1977.

S/John D. Miller

John D. Miller
Counsel for the Petitioner

APPENDIX

OPINION AND JUDGMENT OF STATE COURT

COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION II

ERIN ROBERT RUSSELL		**PLAINTIFF**
-vs-	**OPINION AND JUDGMENT**	**NO. 18086**
COMMONWEALTH OF KENTUCKY		**DEFENDANT**

* * * * * * * *

This matter is before the Court on Erin Robert Russell's petition under R. Cr. 11.42 and C. R. 60.02. He seeks to void two misdemeanor convictions in the Owensboro Police Court and to void the conviction for the "third offense of selling alcoholic beverages without a license" and also voiding the conviction for voluntary manslaughter rendered by a jury in the April, 1974 criminal term of court. He was sentenced to life imprisonment under the Habitual Criminal Statute for the last named offense. The thrust of his argument is that the record is silent as to whether or not he had counsel at the two misdemeanor convictions; and he testified that he, in fact, did not have counsel. At both of the misdemeanor convictions he paid a fine only and received no jail sentence.

The Court is of the opinion that the law does not now require nor did it at the time of the two misdemeanor convictions require the presence of an attorney in the absence of a sentence depriving a defendant of his freedom.

JUDGMENT

For the reasons indicated the relief sought is denied and the petition is dismissed with costs to the petitioner.

This the 7th day of March, 1975.

S/Robert M. Short
Judge, Daviess Circuit Court
Division II

Copies Mail To:

Hon. John D. Miller
Attorney for Plaintiff

Hon. Stewart B. Elliott
Assistant Commonwealth Attorney

RENDERED:
October 17, 1975

COURT OF APPEALS OF KENTUCKY

75-269

ERIN ROBERT RUSSELL **APPELLANT**

APPEAL FROM DAVIESS CIRCUIT COURT
V. HONORABLE ROBERT M. SHORT, JUDGE
INDICTMENT NO. 18086

COMMONWEALTH OF KENTUCKY **APPELLEE**

MEMORANDUM OPINION PER CURIAM

AFFIRMING

It is the opinion of the Court that the judgment should be and it is affirmed.

All concur.

Attorney for Appellant:

John D. Miller
Miller, Taylor & Burlew
Masonic Building
227 St. Ann Street
Owensboro, Kentucky
42301

Attorney for Appellee:

Ed W. Hancock
Attorney General

Guy C. Shearer
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

MEMORANDUM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

ERIN ROBERT RUSSELL, Petitioner	)	
v.	)	NO. C-76-0046-0(G)
HENRY E. COWAN, WARDEN, Respondent	)	

MEMORANDUM

This matter concerns a petition for writ of habeas corpus filed by petitioner, an inmate at the Kentucky State Penitentiary, with the assistance of retained counsel. Petitioner is now serving four consecutive sentences totaling fourteen (14) years, but the one in dispute here is a life sentence imposed in the Daviess Circuit Court on May 21, 1974, which is to be served after completion of those fourteen (14) year sentences. Petitioner was tried on a murder charge and for being a habitual criminal with two prior felony convictions (knowingly receiving stolen property and third offense selling alcoholic beverages without a license). He was found guilty of voluntary manslaughter and of being a habitual criminal[1] with two

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1 *KRS 431.190* Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

prior felony convictions, the latter two being the basis for the life sentence instead of twenty-one years as a conviction only of voluntary manslaughter would have permitted.

The primary contention is that the habitual criminal conviction is based on a tainted prior felony conviction. He claims that the felony conviction of selling alcoholic beverages without a license (third offense) is constitutionally infirm because the two prior misdemeanor selling offenses, necessary predicates to make the third like offense a felony,[2] were obtained without the benefit of counsel. He testified at an RCr 11.42 hearing on this issue that at the time he entered pleas of guilty to those misdemeanors in police court on October 21, 1963, and January 13, 1964, he did not have counsel, was not aware that he could have counsel, and could not have afforded to employ counsel had he so known (Transcript of Hearing 16, 17, 26). The police records do not show that counsel was present either occasion.

Petitioner is a fifty-seven year old man with a long criminal history. We note that only as it may be relevent to petitioner's assertion that he was unaware in 1963 and 1964 that he was entitled to counsel, as well as his alleged financial

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2 *KRS 243.990(2)* provides for a fine of not less than $100.00 nor more than $200.00, or imprisonment in the county jail for not more than six months, or both, for the first offense. For the second offense, the punishment is a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not more than six months, or both. For the third offense and each subsequent offense, the punishment is a fine of not less than $500.00 nor more than $5,000.00, or imprisonment in the penitentiary for not more than five years, or both. Thus, the third offense constitutes a felony under Kentucky law.

inability to employ counsel, to be discussed later. Petitioner's troubles began in 1945 and until the critical time herein in question, 1963, he had appeared in court at various times on charges of unlawful assembly, carrying a concealed weapon, assault with a deadly weapon, drunk and disorderly, common nuisance, drunk, wreckless driving, failing to render aid, and storehouse breaking. It appears that he was able to have the felony charges amended to misdemeanors for disposition, and on at least three occasions between 1945 and 1963 he was represented in court by retained counsel (assault with deadly weapon in 1945, and at a trial on storehouse breaking charges resulting in a hung jury, and he later pleaded guilty to a reduced charged in 1961). Thereafter on:

> October 7, 1963, he was charged in police court with selling alcoholic beverages without a license (first offense) K.R.S. 243.020, the punishment for which is provided in K.R.S. 243.990(2). October 16, 1963, he was indicted for knowingly receiving stolen property and carrying a concealed weapon. He was represented by a retained attorney. October 17, 1963, he pleaded guilty to an amended charge of assault and battery. The other charge was continued to April 1964 term and he was placed on bond. October 21, 1963, petitioner pleaded guilty to the October 7 charge and received the minimum fine, which was paid. The record makes no reference to counsel, and petitioner testified at a 1975 (RCr 11.42 hearing that he did not know he could have counsel, and could not afford to hire one anyway. January 13, 1964, he pleaded guilty to selling alcoholic beverages without a license (second offense), and the recidivist aspect of the statute was applied, and the increased, but again minimum, fine was imposed and paid. Again the record is silent as to counsel, but petitioner testified at the RCr 11.42 hearing that he did not know he had a right to counsel, and could not afford to hire one anyway.

March 1964, petitioner, represented by counsel, was acquitted of a charge of selling without a license (third offense). April Term 1964, petitioner, represented by counsel, pleaded guilty to the reduced charge which had been continued over from October 17 court appearance.

August 14, 1964, represented by counsel, he pleaded guilty to contributing to the delinquency of a minor, and paid a fine. February 19, 1965, represented by counsel, he was convicted of two counts of knowingly receiving stolen property for which he received five-year consecutive sentences on each. The conviction was appealed and affirmed. *Russell v. Commonwealth, Ky.*, 403 S.W. 2d 694 (1966).

August 31, 1965, represented by counsel, he was convicted of selling alcoholic beverages (third offense and thus a felony) and operating a game of chance, and sentenced to three and one-year terms, respectively, consecutive to each other and consecutive to the terms imposed February 19, 1965. The conviction was appealed and affirmed. *Russell v. Commonwealth, Ky.*, 405 S.W. 2d (1966). No issue was raised on this appeal that the selling felony conviction was tainted by the two prior misdemeanor selling convictions. December 1969, he was paroled.

January 1974, he was indicted for murder and as a habitual criminal with two prior felony convictions (February 1965 stolen property convictions, and selling alcohol third offense August 1965).

April 1974, petitioner's retained counsel filed a Petition for Writ of Prohibition and Mandamus in which he urged that the habitual criminal statute cannot be used to enhance the punishment to life when the primary charge (murder) already carries a life penalty, and further that the third offense selling charge, made a felony only because of two prior misdemeanor selling convictions, is not a "true felony" for the purpose of enhancing punish-

ment under the recidivist statute, and thus that the indictment should be quashed, or in the alternative he should be afforded a bifurcated trial. No claim was advanced that the third selling offense resulting in the felony conviction was in any way defective. See unnumbered page 3 of Exhibit C to the instant petition where counsel states in that petition to the state court that ". . . petitioner does not attack the validity of his prior convictions . . ." The petition was denied.

May 1974, petitioner was tried on the charges in the indictment returned in January. He was convicted of voluntary manslaughter and of being a habitual criminal because of the two prior convictions, and sentenced to life as authorized by the recidivist statute. The manslaughter charge alone would authorize only twenty-one years. (The uncontested prior conviction of knowingly receiving stolen property would have authorized double punishment on the principal charge). This conviction was appealed and on January 31, 1975, it was affirmed.

January 1975, while the above appeal was pending, petitioner's counsel filed a motion in the trial court to vacate under RCr 11.42, collaterally attacking for the first time the validity of the third selling offense in 1965 which resulted in one of the prior felony convictions, urging that petitioner was without counsel when he received his first two misdemeanor selling convictions, and thus they were improperly used to enhance the third selling offense into a felony. Following an evidentiary hearing, a transcript of which has been filed with this record, his motion was denied.

October 1975, the denial of his motion to vacate was affirmed on appeal.

March 1976, this petition for writ of habeas corpus. We have pending before us at this time motions by petitioner's counsel for a pretrial conference and an evidentiary

hearing. Because we are of the opinion that the issues are adequately framed by the pleadings and the many exhibits attached thereto, and the fact that the Transcript of the RCr 11.42 hearing filed with this record afforded him a full, fair and adequate hearing for a determination of the factual issues involved, we deny these motions. *Townsend v. Sain*, 372 U.S. 293 (1963).

Petitioner relies mainly upon *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972), quoting therefrom that "absent a waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at trial." The records of the police court show neither presence of counsel, nor waiver thereof, when he pleaded guilty to the two misdemeanor selling charges in October 1963 and January 1964. He asserts that these two uncounselled misdemeanor convictions were pyramided into a felony conviction which later was used to support the recidivist conviction, and thus he is serving a life sentence as a direct result of those two uncounselled misdemeanor convictions.

There is no contention that *Argersinger* was violated at the time he was fined and not jailed on the two misdemeanor counts, only that when they are subsequently relied on in part to establish past criminal conduct in support of a habitual criminal charge and confinement, does *Argersinger* require that they be disregarded.

We do not reach that question. It cannot be said that every uncounselled conviction is, per se, invalid. In fact, in *Argersinger* it was specifically stated that it was the "denial" of counsel not the waiver thereof which was condemned. (P. 37). Had the police court records shown a conscious and voluntary waiver of counsel, no question of this variety about the present habitual offender conviction would be presented. The fact that those records are silent, however, does not require us to find that he was denied counsel, because the fact of waiver may be established by the state at a subsequent hearing such as was held herein on the RCr 11.42 motion to vacate.

Petitioner's self-serving testimony that on the two

occasions is question he did not know he had the right to counsel, did not waive assistance of counsel, and even if he did he could not have retained counsel, is clearly refuted by the facts. We know not why he on these occasions chose not to have the assistance of counsel, but we surmise that he was well aware that he was going to pay the minimum fine as a bootlegger and did not see the need for counsel, and did not then anticipate the ultimate significance of these convictions to a later habitual criminal charge, just as many others in similar situations may not anticipate how a conviction may later haunt them. Their failure to anticipate the full range of the consequences of a conviction, however, does not insulate them from those consequences. Petitioner made his choice. It strains credulity beyond the breaking point that he did not know he could have counsel, when on at least three prior excursions into the courts he had retained counsel. In fact, on October 21, 1963, and on January 14, 1964, when he pleaded to the two misdemeanor selling charges for the minimum fines he was then represented by retained counsel on another charge. When he was faced with a third selling charge in March 1964, aware of the immediate significance of a third conviction, he retained counsel and was successful in getting acquitted. The pattern is clear - when he felt it advantageous, he retained counsel. When he could get off cheaply, he didn't.

Could he afford counsel on these two occasions? He was employed (TH 22). He had received $10,000.00 from his mother for his interest in his deceased father's farm. (TH 25). He owned so some old cars. He always paid his fines. He could appeal his felony convictions. When he needed counsel, he retained one. We conclude that all these circumstances establish that on the occasions in question petitioner was aware that he could have the assistance of counsel and could have retained one, but for his own reasons chose not to do so.

Petitioner next contends that his Fifth and Fourteenth Amendment rights were violated when he was

asked on cross-examination why he did not claim self defense when he was arrested. He correctly cites *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 21 33 (1975) and *Doyle v. Ohio*, U.S. , 96 S.Ct. (1976) for the proposition that the constitution is offended by the impeachment of a defendant by his post-arrest silence and after receipt of the warnings required by *Miranda v. Arizona*, 384 U.S. 4 36 (1966). The facts in the petitioner's case, however, do not square with those in either *Hale or Doyle*. In each of the latter cases, the defendants, after receiving their Miranda warnings, exercised their rights to remain silent and made no statement. The court held that their "silence" could not be used against them, but, in *Doyle*, however, the court noted,

> "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. Cf United States v. Fairchild, 505 F.2d 1378, 1383 (CA5 1975)." N.11

If silence can constitute behavior which can be used to impeach, certainly an inconsistent statement made after full advice as to rights, can be so used. Our petitioner did not elect to exercise his right to remain silent. Instead, all he "want(ed) to do is tell exactly what happened. . . ." (Unnumbered page 10, line 6, Petitioner's Memorandum of Point and Authorities). A fair characterization of his statement made to the police is that the killing was accidental - he pulled his gun to "scare him", and "the damn thing went off." The thrust of his trial testimony was toward self defense - that he was "terrified." He was asked on cross-examination why he had not offered this explantion to the police, impliedly rather than the accident

version. He was impeached, not by his silence to which he had a constitutional right, but by his inconsistent explanation made after he voluntarily waived his right to remain silent. We hold this to be proper, and not contrary to either the Fifth or Fourteenth Amendment.

The next contention is that petitioner's Sixth Amendment rights were violated when he was not permitted to call witnesses to testify to decedent's bad reputation for keeping the peace. The petitioner did not know the victim, so he was unaware of the victim's reputation at the time he shot him. Under *Wooten v. Commonwealth, Ky.*, 478 S.W. 2d 701 (1972) such evidence is not available to a defendant who is not aware at the time of the event that the victim has such a reputation, although respondent concedes that it might be admissible if there exists an issue as to which party was the aggressor. There was no dispute that the victim hit petitioner first and that the latter then pulled his gun and it discharged.

The question of admissibility of evidence is for the states and is not reviewable on federal habeas corpus unless there is an error of such magnitude so as to deny fundamental fairness. *U.S. ex rel Clark v. Fike*, 538 F. 2d 750 (7th Cir. 1976). If is clear that the victim was the aggressor. That he was denied the right to call witnesses to expand on the uncontradicted aggressor issue could not have denied him fundamental fairness.

The final issue also deals with an uncounselled prior conviction. In his statement to police officers following his arrest for the killing which resulted in him being charged with murder, petitioner expanded on the accident version by attempting to explain his unfamiliarity with guns. He stated, "I never fired a gun or nothing before in my life, and (sic) fact I never carried a gun." (Exhibit K). The commonwealth's attorney was permitted to counter this explanation by eliciting from petitioner his admission that in August 1945 he had pleaded guilty to carrying a concealed deadly weapon in police court, and had been indicted for assault with a deadly weapon which was reduced to breach of the peace, and to

which reduced charged he pleaded guilty. He explained that on the former charge, another person actually owned the weapon. (Unnumber page 15, Petitioner's Memorandum of Points and Authorities). He alleges that when he pleaded guilty to the first charge, and at the preliminary hearing in police court on the felony charge, he was without counsel, not having been advised of his right thereto, did not waive same, nor was he financially able to retain counsel. He did have counsel when the latter charge was reduced. (TH 27-29). While we recognize that petitioner has the burden of establishing that he did not waive, and could not afford counsel, respondent has not challenged this assertion, and in fact did not respond to this issue. For the purposes of disposing of this issue, we will assume the truthfulness of those assertions.

Petitioner directs no complaint to the testimony concerning his appearance in court, represented by counsel, when the charge of assault with a deadly weapon was reduced to the misdemeanor charge to which he pleaded guilty. We believe that under the circumstances herein that any reference to his uncounselled appearance at the preliminary hearing and to the concealed weapon charge, explained away as it was, even if error, was harmless error beyond a reasonable doubt and did not deprive him of due process. *Cf Thomas v. Savage*, 513 F.2d 536 (5th Cir. 1975).

Accordingly, we find petitioner's claims to be without merit, and a separate judgment will be entered dismissing the petition.

Date: 10/15/76

S/James F. Gordon
James F. Gordon
Senior District Judge

ENTERED

OCT 15 1976

August Winkenhofer, Jr. Clerk
By s/Betty Bruton
Deputy Clerk

Copies to:

Erin Robert Russell, Petitioner

Counsel for Petitioner

Attorney General, Commonwealth of Kentucky

United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION FILE NO. 76-0046-0

ERIN ROBERT RUSSELL,	)	
Petitioner,	)	
vs.	)	JUDGMENT
	)	
HENRY E. COWAN, WARDEN	)	
Respondent	)	

This action came on for trial before the Court, Honorable James F. Gordon , United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged, pursuant to the Memorandum of this day, that petitioner's Petition for Writ of Habeas Corpus be, and the same is hereby, dismissed and this action is removed from the docket of this Court.

Dated at Owensboro, Kentucky , this 15th day of October, 1976.

S/August Winkenhofer, Jr.
Clerk of Court

ENTERED BY:
S/Betty Bruton
Betty Bruton, Deputy Clerk

OCT 15 1976

August Winkenhofer, Jr. Clerk
By S/Betty Bruton
Deputy Clerk

NO. 76-2622

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT FILED

APR 21 1977

JOHN P. HEHMAN, Clerk

ERIN ROBERT RUSSELL
Petitioner-Appellant

v.

HENRY E. COWEN, WARDEN
Respondent-Appellee

ORDER

Before: PECK and LIVELY, Circuit Judges, and GUY,* District Judge.

Petitioner-appellant perfected this appeal from an order of the district court denying his petition for a writ of habeas corpus. In said petition petitioner-appellant contends that his conviction in a Kentucky state court of being a habitual criminal is constitutionally flawed because one of the prior convictions relied upon was in turn based on his third conviction for selling alcoholic beverages without a license. That offense is a misdemeanor under Kentucky law, which further provides, however, that the third such conviction shall constitute a felony. Appellant was represented by counsel at such third trial, but was not represented at either of the first two such trials. It is concluded that since appellant did not raise this issue as a defense in the third such trial he may not be heard to raise it here. It being further concluded that no violation of any constitutional right arose out of a cross-examination herein challenged, and that appellant's other contentions on appeal are without merit,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

S/John P. Hehman
John P. Hehman, Clerk

*
Honorable Ralph B. Guy, Jr., United States District Judge for Eastern District of Michigan, Southern Division, sitting by designation.

Supreme Court, U. S.
FILED
AUG 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6

ERIN ROBERT RUSSELL, PETITIONER

V.

HENRY E. COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY
RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT F. STEPHENS
Attorney General

GUY C. SHEARER
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Telephone (502) 564-7600

COUNSEL FOR RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO.

ERIN ROBERT RUSSELL, PETITIONER

V.

HENRY E. COWAN, SUPERINTENDENT
KENTUCKY STATE PENITENTIARY
RESPONDENT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Erin Robert Russell, seeks a writ of certiorari issue to review the order the United States Court of Appeals for the Sixth Circuit entered on April 21, 1977, affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

(1) The Opinion and Judgment of the Daviess County, Kentucky, Circuit Court, denying relief and dismissing petitioner's petition under R. Cr. 11.42 and C. R. 60.02 (Appendix 1a).

(2) Memorandum Opinion Per Curiam of the Court of Appeals of Kentucky (then Kentucky's highest court), affirming (Appendix 3a).

(3) Memorandum Opinion and Judgment of the United States District Court for the Western District of Kentucky, finding petitioner's claims to be without merit, dismissing and removing the action from the docket Appendix 4a).

(4) Order of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the District Court (Appendix 17a).

JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit was entered on April 21, 1977. This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED BY PETITIONER

1. The order of the Sixth Circuit, in affirming the United States District Court for the Western District of Kentucky, is clearly in defiance of established rule of this Court as enunciated in *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972), and *Berry* v. *City of Cincinnati, Ohio*, 414 U.S. 29, 94 S.Ct. 193 (1973). Said order of the Sixth Circuit affirms the practice of the Kentucky state court in the use of prior, uncounselled misdemeanors in impeaching a defendant, supporting

his conviction, and enhancing his punishment; all resulting in "loss of liberty".

2. This case presents a clear opportunity for this Court to determine the scope of the *Argersinger-Berry* rule, and to determine whether said rule shall be coextensive with *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963) in regard to the collateral use of "uncounselled convictions."

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved is the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

The statutory provisions involved are as follows:

Kentucky Revised Statute (hereinafter referred to as K.R.S.) 431.190 provides:

> Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the

fact of former convictions for felony committed by the prisoner, in or out of this state.

K.R.S. 243.020 (1) provides:

No person shall do any act authorized by any kind of license with respect to the manufacture, storage, sale, purchase, transporting or other traffic in alcoholic beverages unless he holds the kind of license that authorizes such act.

K.R.S. 243.990 (2) provides:

Any person who, by himself or through another, directly or indirectly, violates subsection (1) of K.R.S. 243.020 shall, for the first offense, be fined not less than one hundred (100) nor more than two hundred dollars ($200), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; for the second offense he shall be fined not less than two hundred (200) nor more than five hundred dollars ($500), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; and for the third and each subsequent offense, he shall be fined not less than five hundred (500) nor more than five thousand dollars ($5,000), or be imprisoned in the penitentiary for not more than five (5) years, or both.

COUNTER STATEMENT OF CASE

Petitioner, Erin Robert Russell, is serving a life sentence in the Kentucky State Penitentiary. His sentence

was imposed under K.R.S. 431.190 as an habitual criminal, by the Daviess County, Kentucky, Circuit Court, on May 21, 1974. The sentence grew out of a single-phase trial, wherein the petitioner was found guilty by a jury. That jury also found the petitioner as having been convicted of two prior felonies. As a consequence, his sentence was fixed by this same jury at life imprisonment as an habitual criminal under the aforesaid K.R.S. 431.190. Judgment was entered accordingly.

Petitioner has heretofore attacked this life sentence in the Daviss County, Kentucky, Circuit Court; the Kentucky Court of Appeals (then the state's highest court); the United States District Court for the Western District of Kentucky; and the United States Court of Appeals for the Sixth Circuit; on the basis that one of the prior felony convictions upon which his life sentence is based was, itself, tained under the doctrine of *Argersinger-Berry, supra,* through the collateral use of prior uncounselled misdemeanor convictions ultimately resulting in loss of liberty to the petitioner.

The Daviess Circuit Court (trial court) denied the petitioner relief, on the basis that *Argersinger-Berry* do not apply "Collaterally". The Kentucky Court of Appeals affirmed in a Memorandum Opinion Per Curiam.

The United States District Court for the Western District of Kentucky, in a petition for habeas corpus relief (Title 28 U.S.C. § 2241-2254), denied petitioner relief, without reaching the *Argersinger-Berry* question.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the United States Dis-

trict Court for the Western District of Kentucky, denying habeas corpus relief on the grounds that petitioner had "waived" his *Argersinger-Berry* rights in 1965.

It is, and has been, the contention of the petitioner that his 1965 felony conviction for the third offense of selling alcoholic beverages without a license (bootlegging on Sunday), although itself counselled, was constitutionally flawed for reason that pursuant to the Kentucky "bootlegging" recidivist statute the two prior misdemeanor convictions, although not themselves resulting in petitioner's imprisonment, were uncounselled. In short, the sequence of events is as follows:

1. In 1963, the petitioner was convicted and fined $100 00 for violating K.R.S. 243.020 (1) (bootlegging on Sunday), in the City of Owensboro, Daviess County, Kentucky, Police Court, upon a plea of guilty. This conviction was uncounselled.

2. In 1964, the petitioner was convicted of the *second offense* under the aforesaid statute; and was fined $200.00 under the provisions of K.R.S. 243.990(2), on a plea of guilty. This conviction was also uncounselled.

3. In 1965, the petitioner was convicted of the *third offense* of violating K.R.S. 243.020 (1) (a felony, pursuant to K.R.S. 243.990 [2]) with the aid of counsel. In this conviction, the two prior uncounselled convictions were considered by the jury to support the third offense, which was enhanced into a felony and resulted in the petitioner being imprisoned.

4. In 1974, the petitioner was charged with the offense of murder, in the Daviess County, Kentucky, Circuit Court, there being alleged in the indictment two prior felony convictions, *one of which was the 1965 conviction for the third offense of selling alcoholic beverages without a license.* (In addition, during this trial the petitioner was impeached by the use of a 1945 uncounselled misdemeanor conviction). In this single-phase trial, petitioner was found guilty by the jury of voluntary manslaughter (a lesser degree of the primary charge, under Kentucky law); and the jury, in consideration of the two prior felony convictions, fixed his punishment at life imprisonment, in accordance with K.R.S. 431.190. Petitioner has insisted throughout, that one of the prior felony convictions, to wit: the 1965 conviction for the third offense of selling alcoholic beverages without a license, was constitutionally tainted, in that same was, itself, based upon the 1963 and 1964 "uncounselled" misdemeanor convictions.

COUNTER STATEMENT AND HISTORY OF CASE

The Petitioner/Appellant, Erin Robert Russell, in his appeal to the Court of Appeals of Kentucky, File No. 75-269, presented only one question in his behalf.

The statement presented was:

> "Whether uncounseled misdemeanor convictions, although they do not result in imprisonment themselves, may be used to support a conviction or to

enhance punishment under state recidivist statutes, where imprisonment will result."

The Petitioner/Appellant, Erin Robert Russell, Kentucky State Prisoner No. 26349, has attached as exhibits Memorandum of Points and Authorities and alleges that he has filed his petition pursuant to Title 28, U.S. Code, Section 1254, seeking relief from state court confinement.

The Petitioner/Appellant maintains that his confinement resulted from, a "Constitutionally deficient trial."

Alcoholic beverage businesses are the only businesses specifically regulated by the Constitution of the United States. The liquor controlling problems have twice been responsible for amendment the United States Constitution. The businesses were limited and almost abolished altogether by the 18th Amendment. The 21st Amendment was the last regulation to be inserted into the Constitution and it reads:

> "[1] The Eighteenth Article of Amendment to the Constitution of the United States is hereby repealed.
>
> [2] The transportation and importation into any state or territory or possession of the United States for distribution or use therein for intoxicating liquors in violation of the laws thereof, is hereby prohibited."

The above quotation gives the states and commonwealths of the United States plenary power over the control of intoxicating liquors within their boundaries.

The misdemeanor convictions about which the Petitioner/Appellant complains and cites in support of the basis were alcoholic beverage offenses subject to consideration and review at all times in light of the authority granted the state by the 21st Amendment.

Petitioner/Appellant contends that he appeared twice without counsel at *all stages* of the proceeding. The trial court record was apparently silent as to the appellant's lack of counsel or representation. However, the appellant entered a plea of "guilty", whereupon he was fined $100.00 plus court costs in the amount of $13.50, (the minimum statutory penalty) all of which amounted to a total of $113.50 and the appellant promptly paid the fine.

Approximately three months later, about the 12th day of January, 1964 the Petitioner/Appellant was arrested the second time, charged with a *second* offense of the "illegal sale of alcoholic beverages" in violation of KRS 243.020(1). Petitioner/Appellant contends that he again appeared without the assistance of counsel at all stages of the proceeding and entered a plea of "guilty" to the second offense, whereupon the court imposed a fine of $200.00; and the appellant was ordered to pay court costs in the sum of $3.50, all of which amounted to the sum of $203.50. The fine imposed was the minimum statutory fine for the offense. Again, the Petitioner/Appellant promptly paid the fine and court costs and there was no incarceration imposed. In each of the two separate bootlegging convictions resulting from pleas of guilty, Petitioner/Appellant was punished pursuant to the provisions of KRS 243.990(2).

On the 11th day of May, 1965, the Petitioner/Appellant was indicated by the grand jury of Daviess County, Kentucky, and charged with the *Third* offense of "illegal sale of alcoholic beverages." The grand jury's indictment charged:

> "Count 1. That on or about the 21st day of March, 1965, in Daviess County, Kentucky, the above named defendant did set up, keep, manage or operate or conduct a contrivance used in betting whereby something of value may be won, against the peace and dignity of the Commonwealth of Kentucky.
>
> Count 2. That on or about the 21st day of March, 1965, in Daviess County, Kentucky, the above named defendant did unlawfully sell to William Payne two half pints of J.T.S. Brown 100 proof whiskey, knowing that he did not have a license to sell same, this being the third offense of selling whiskey without a license against this defendant, having resulted in three prior convictions which are dated October 21, 1963 and recorded in City of Owensboro Police Court Docket Book No. 89, Page 165; January 13, 1964, and recorded in Book No. 89, Page 238; and March 30, 1965, recorded in Book No. 90, Page 282, against the peace and dignity of the Commonwealth of Kentucky."

KRS 243.990(2) is a punishment section of Kentucky's Alcoholic Beverage Control law enacted pursuant to the 21st Amendment of the Constitution of the United States. The statute provides for enhanced punishment upon repeated (recidivist) convictions.

KRS 243.990(2) reads:

> "Any person who, by himself or through another, directly or indirectly, violates subsection (1) of KRS 243.030 shall, for the first offense, be fined not less than one hundred (100) nor more than two hundred dollars (200), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; for the second offense he shall be fined not less than two hundred (200) nor more than five hundred dollars (500), or be imprisoned in the county jail or workhouse for not more than six (6) months, or both; and for the third and each subsequent offense, he shall be fined not less than five hundred (500) nor more than five thousand dollars (5,000), or be imprisoned in the penitentiary for not more than five (5) years, or both."

Petitioner/Appellant was tried on the *third* offense of "illegal sale of alcoholic beverages" and was effectively represented by counsel "at all stages of the proceedings." Petitioner/Appellant was convicted of the offense set out in the indictment and sentenced to three years in the Kentucky State Penitentiary. Therafter, the conviction was affirmed on appeal and is reported in *Russell* v. *Commonwealth*, Ky., 405 S.W.2d 683 (1966).

Petitioner/Appellant *admits* that the question of the validity of the two "prior" bootlegging convictions was *not* raised at the trial in the circuit court nor was it presented or the validity questioned in the Petitioner/Appellant's appeal to the Kentucky Court of Appeals. Had the validity question been presented for the first time on the appeal to the Court of Appeals it would have

been untimely and the failure to assert a claim in the trial courts would have precluded its consideration on appeal. See *Ferguson* v. *Commonwealth,* Ky., 512 S.W. 2d 501 (1974); Cr. Law Key 695-½ Ky. Dig.; Cr. Law, Ky. Dig. 1038.2; *Foster* v. *Commonwealth,* Ky., 507 S.W. 2d 443 (1974).

When the complaint is presented for the first time in an 11.42 Rule of Criminal Procedure proceeding it should be rejected. See *Beets* v. *Commonwealth,* Ky., 437 S.W.2d 496 (1969); RCr 9.54(2).

Petitioner/Appellant, on page 2 of his brief, alleged that he "was confined in the Kentucky State Penitentiary for this three year sentence, together with other sentences previously obtained." If the entire three-year sentence was served, then, in that event, the question would have become and is now moot.

Petitioner/Appellant contends that "on or about December 5, 1969" he "was granted parole from the Kentucky State Penitentiary." Petitioner/Appellant 'while on parole, on January 15, 1975, was indicted by the Daviess County, Kentucky grand jury, on a "three count' indictment." The primary charge set forth in the indictment was willful murder in violation of KRS 435.010(DCC TR p. 27). One of the two additional counts set out in the indictment charged that there were two convictions of "the prior felonies" and the further charge was that the "third offense" conviction of "selling alcoholic beverages without a license" which the Petitioner/Appellant had previously received, which resulted in or brought the petitioner within the purview of Kentucky's habitual criminal statute, KRS 431.190.

Petitioner/Appellant, on the 30th day of December, 1974, petitioned the Daviess Circuit Court for relief under RCr 11.42 and C.R. 60.02, jointly or in the alternative. Petitioner/Appellant alleges that RCr 11.42(4) is his authority for attacking the "prior convictions" in both the Daviess Circuit Court and the inferior Police Court of the City of Owensboro, Kentucky.

The first plea of guilty conviction of the Petitioner/Appellant on the charge of illegally selling alcoholic beverages occurred on October 10, 1963, and appears in the Owensboro, Kentucky Police Court file record as Case No. 88-522. The Judgment of conviction appears in the Police Court's Docket Book 89, page 165.

The second plea of guilty conviction of Petitioner/Appellant on the charge of illegally selling alcoholic beverages appears in the City of Owensboro, Kentucky, Police Court File #89-102. The judgment of the second conviction appears in the court's Docket Book 89, page 238. Copies of the conviction judgments appear in the Transcript of Record and were filed as Exhibits "A" and "B" respectively, along with appellant's RCr 11.42 petition.

The Petitioner/Appellant was not convicted of murder (KRS 435.010). The appellant was, however, convicted of voluntary manslaughter in violation of KRS 435.020 (a Lesser degree of homicide under Kentucky law); and he had previously been convicted of two counts of knowingly receiving stolen property and sentenced to a five year and a three year sentence. See *Russell* v. *Commonwealth,* Ky., 403 S.W. 2d 694 (1966). Petitioner/Appellant was also found guilty by the trial

jury of violating the habitual criminal state, KRS 431.190 on August 31, 1965, in that he was "convicted a third time of felony" and sentenced to "life imprisonment." The conviction was actually his fourth felony conviction. The judgment of conviction appears in the office of the Daviess County Circuit Court Clerk, Order Book 42, page 146. A certified copy of said conviction was attached to the 11.42 petition and was made a part thereof, marked Exhibit "H."

The question of the validity of the first two "prior" pleas of guilty on misdemeanor convictions was allegedly made in the absence of counsel. The record of the two misdemeanor pleas of guilty convictions of the Owensboro Police Court is silent on the question of representation by counsel. The validity of the habitual criminal conviction (violation of KRS 435.010) is also challenged, as Petitioner/Appellant contends that one of the felony conviction offenses did not exist at the time of his conviction as an habitual criminal. The allegation is predicated and based on the claim that one of the alleged valid prior felony convictions did not exist at the time of appellant's habitual criminal convictions. Petitioner/Appellant claims that only one-third of the necessary felony offenses existed since Petitioner/Appellant had been without counsel on the two occasions he entered pleas of guilty to the liquor law violations in the Police Court. Hence he claims one of the felony convictions was illegally constituted and that three valid felony convictions (full three-thirds) were necessary; that only one-third of the offense actually existed and that this did not constitute and meet the requirement of KRS 435.010.

The Petitioner/Appellant appealed the life sentence conviction on the habitual criminal charge and the opinion of the Circuit Court was affirmed in a per curiam opinion of the Kentucky Court of Appeals in Flie No. 74-758.

Petitioner/Appellant admits that he wasn't so indigent but what he had money to pay the fines levied by the court and the court costs in the action. He or his mother certainly were not too poor to pay the fines and costs assessed against him.

Petitioner/Appellant was a veteran of previous court actions and felony convictions having been convicted on two counts of knowingly receiving stolen property and sentenced to a five year sentence and a three year sentence which ran consectively and on which he made parole on January 16, 1974 as parole number 65048.

On April 29, 1974 Petitioner/Appellant, Erin Robert Russell filed a Petition for Writ of Prohibition and Mandamus in the Kentucky Court of Appeals, File No. 74-313 which petition was subsequently denied May 17, 1974. The Court held petitioner had adequate remedy by appeal.

He was certainly of sufficient intelligence to know whether or not he was guilty of the offenses upon which he had been indicted. He was neither ignorant, illiterate, indigent nor inexperienced in court cases. Ptitioner/Appellant states he elected to act on his own initative and to enter his pleas of guilty because he was indignet and he was guilty of the offenses charged. Petitioner/Appellant could certainly have requested a jury trial.

In the court it has been the custom when the accused requested a jury trial for the court to reply, "Be sure you bring your lawyer and let us know who he is."

Petitioner/Appellant and his counsel *waived his contention as to his first two pleas of guilty when he failed to raise the question at the circuit court trial in which he had counsel "at all stages of the proceedings."* This issue was raised in the evidentiary hearing.

ARGUMENT

The 21st Amendment of the Constitution of the United States gave each State the right to determine what is needed in the way of legislation, regulation and control of alcoholic beverages within its borders to protect the health, welfare, safety and morals of its people. There is no question about the punishment provisions of KRS 243.990(2) which provide for the enhancement of penalty with the first three convictions of illegally selling alcoholic beverages in Kentucky. The same statutory section applied to each of the three offenses.

Petitioner Appellant, if he is to be believed, knew that KRS 243.990(2), the penalty section of the liquor control statutes for the offenses with which he had been charged, provided for the enhancement of penalty for repeated subsequent convictions. Hence, he did not want, seek or request counsel when he was charged with the first police court offense, when it was called for trial. He deliberately elected to and did by his action waive and avoided the presence and assistance of counsel. He sought and obtained the minimum penalty provided by

KRS 243.990, which was the $100 fine plus court costs. When the second offense was called, *appellant knew the minimum penalty would be greater but he was prepared to and did again plead guilty and again received the minimum penalty of $200 fine plus court costs, which he paid.* The same penalty section and subsection set out the enhancement for each of the three consecutive convictions. For the court to state or for any individual to read the subsection without being apprised of the enhancement penalties is hard to believe.

Petitioner/Appellant, from his previous court experiences, knew he didn't have to face his accusers in police court in any instance without a lawyer to assist him. He had a money source, *no portion of which did he elect to spend to employ an attorney. He knew he was guilty of the offense charged and by pleading guilty he sought and was given the minimum penalty. He was also able to avoid any possible payment of an attorney fee.*

The rationale now advanced in Petitioner/Appellant's behalf is that there was no reason to question the first two misdemeanor liquor guilty pleas convictions until after he had received his third conviction and faced possible deprivation of liberty as a result of the third conviction. Yet, during the course of his trial which resulted in the third conviction, *the two previous convictions were not challenged.*

Beginning back in 1945, as was pointed out in Judge James F. Gordon's Memorandum in the United States District Court on page 3 thereof, the fifty-seven year old Petitioner/Appellant began acquiring a criminal record

which extended to and included the critical offenses of 1963. He had appeared in court at various times on charges of unlawful assembly, carrying a concealed weapon, assault with a deadly weapon, drunk and disorderly, common nuisance, drunk, reckless driving, failing to render aid, and storehouse breaking.

Apparently through one clever move after another either *with or without the assistance of counsel he was able to have the felony charges amended to misdemeanors for disposition. On no less than three occasions between 1945 and 1963 he was definitely represented in court by his retained counsel* (*Assault with a deadly* weapon in 1945, and at a trial on storehouse breaking charges resulting in a hung jury, and he later pleaded guilty to a reduced charge in 1961). There was apparently little the Petitioner/Appellant did not know about retaining counsel, having counsel appointed by the court, getting felony charges amended to misdemeanors, etc.

Russell urges that the district court erred in refusing to condemn the state court procedure of using "uncounselled prior misdemeanors to support his conviction, enhance his punishment and impeach him during trial.

The Petitioner/Appellant and his counsel heard the indictment, Exhibit B, read in open court. He and his counsel were also given copies of it and they knew its contents.

Judge Robert M. Short, of the Daviess Circuit Court, Division II, in his opinion herein of March 7, 1975, stated:

> "The court is of the opinion that the law does not now require nor did it at the time of the two misdemeanor convictions require the presence of an attorney in the absence of a sentence depriving a defendant of his freedom."

When a defendant in a misdemeanor case pleads guilty, he knows the probable consequence of his action, as did the Petitioner/Appellant in the instant case. Very little preparation for trial was necessary when the Petitioner/Appellant sought to enter his plea of guilty. The accused in the circumstances was not prejudiced by the absence of counsel since he received the minimum penalty provided by statutory law. No one knew better than the appellant as to whether or not he was guilty or innocent. No one knew better than Petitioner/Appellant, with his record of court convictions, what his chances would have been in a trial before a jury with the aid of counsel. On a plea of guilty in the non-imprisonment minimum fine circumstances, who can or could say the appellant failed to act knowingly and intelligently in pleading guilty in either of his first two offenses? No repercussions or imprisonment stemmed therefrom unless the offender persisted in repeating the disposed of offenses. Petitioner/Appellant was not denied any of his guaranteed rights set out in the Sixth Amendment. No imposition of a jail sentence was involved nor could there be in the absence of repeated offenses, nor did one become involved until the appellant, fully counseled, was tried by a jury on the third offense.

The Court in *Argersinger* v. *Hamlin*, 407 U.S. 25, 33 L.Ed 2d 530, 92 S.Ct. 2006 [4] at page 539 (1972), cited by the Petitioner/Appellant, held that the "denial"

of counsel, not the waiver thereof, would "preclude the imposition of a jail sentence" on the charge then being tried and disposed of. The Court approved but did not hold that the conviction could not be considered for the purpose of fixing punishment of an offense committed at a future time. It was only after Petitioner/Appellant had been convicted and sentenced the third time that he, having waived counsel, sought to use his actions and his failure to seek counsel in his two guilty plea trials as a "backlog" defense in connection with an habitual criminal conviction. Petitioner/Appellant, via RCr 11.42, came forth in a legal sense shouting "uncounseled pleas of guilty" in the first two misdemeanor cases which were tried on January 13, 1964 and October 21, 1963. *Argersinger* v. *Hamlin, supra,* was decided on January 12, 1972.

Petitioner/Appellant had the guiding hand of counsel when he came up for trial on the third charge of selling alcoholic beverages without a license.

The case of *Berry* v. *City of Cincinnati, Ohio,* 414 U.S. 29, 38 L.Ed. 2d 187, 98 S.Ct. 198 (1973), which is cited by Petitioner/Appellant involved the invalidating of a pre-*Argersinger* v. *Hamlin* conviction which involved vastly different circumstances and did not involve voluntary pleas of guilty by a person with sufficient knowledge, repeatedly proven plea bargaining ability and a source of money through which to employ police court counsel. Petitioner/Appellant was fully aware of his legal status at all times and did not decide that an attorney was necessary until he came up for trial on the third bootlegging charge. The record doesn't reveal whether or not his bootlegging actions involved only

himself or himself and his source of finance, his mother. It is clearly apparent from the record Petitioner's pleas of guilty were free from coercion and misrepresentation. He may have been working in concert with others for his source of liquor supply. He may, by his plea action, have been protecting others and his source of supply. In Kentucky the effect of a plea of guilty is to waive all defenses other than that the indictment charges no offense. See *Quarles* v. *Commonwealth,* Ky., 456 S.W. 2d 693, 694 (1970).

The Petitioner/appellant, irrespective of his testimony approved the action of his mother in the paying of the first minimum fine imposed by the police court. He was agreeable to the guilty plea. Soon thereafter he again bootlegged alcoholic beverages and was again apprehended, charged with the offense, and again entered a plea of guilty undoubtedly as a result of plea bargaining and again paid the minimum fine provided by the statute. Again his liberty at that point was *not* at stake as the fine was promptly paid. Unlike the facts set forth in *Argersinger, supra,* appellant's liberty was not at stake on his first misdemeanor conviction on his guilty plea since the statutory penalty (KRS 243.990(2) upon conviction was a fine of not less than one hundred dollars, or upon his second conviction. The recommended and acourt accepted minimum statutory punishment which did not include incarceration as a result of plea bargaining did not constitute constitutional infirmity. See *Butler* v. *Commonwealth,* Ky., 473 S.W. 2d 108 (1971). Plea bargaining in an effort to receive lighter sentence does not give rise to claim of constitutional rights violations.

(See *Davis* v. *Commonwealth*, Ky., 471 S.W. 2d 740 (1971) and KRS 435.190).

Petitioner/appellant did not object to nor had he shortly thereafter *asked for a retrial on the first two misdemeanor convictions* or either of them and he well knew the meaning as well as the consequences of his plea and he had repeatedly received the warnings required in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). It is by no means an immutable, universal fact that in every situation counsel is essential to a fair trial. The government does not always hire lawyers to prosecute petty offenses as officers sometimes present the case. *Argersinger, supra,* at page 545, the Court pointed that "where the possibility of a jail sentence is remote and the probable fine seems small, or where the evidence of guilt is overwhelming, the costs of assistance may exceed the benefits."

The Petitioner/appellant's testimony is so incredible as to be unbelievable. The burden of proof in an 11.42 motion is on the movant-appellant. The RCr 11.42 hearing desired by appellant was granted and proof heard. At line 9, page 15, of the transcript of the evidentiary hearing (hereinafter referred to as TH), appellant denied having counsel or of being informed of his right to have counsel. He testified no one, which, of course, included himself, "said anything about counsel."

As to his first illegal liquor sale offense trial in 1963, Petitioner/appellant testified: *"At that time I didn't have the money to hire an attorney or know that I was supposed to." Yet, eighteen years before at a misdemeanor trial record of the appellant in 1945 revealed,*

he had counsel on that occasion. He also admitted being represented by counsel in a 1960 storehouse breaking felony charge which came on for trial in 1961.

In 1964, on a misdemeanor charge of contributing to the delinquency of a minor, he was again represented by counsel (TE p. 34).

At the trial of the third bootlegging offense, petitioner/appellant admitted he had counsel (TH, p. 19). When the case was first called he was without counsel and the court continued the case so he could get one. (TH, p. 19).

Petitioner/appellant claims he was without funds in 1963 and 1964. The first offense trial was in October, 1963. The second offense was in January, 1964. Appellant admitted he was gainfully employed by the Fletcher Oil Company "out of Illinois" in 1963 (TH, p. 24, lines 10-20). He further admitted he had owned automobiles and was gainfully employed in 1964 (TH, p. 24-27). Petitioner/appellant admitted that in 1963 he inherited and received $10,000 from his father's farm. *He transferred his interest in the farm to his mother for $10,000* (TH, pp. 25-27).

Petitioner/appellant claims that his mother paid the first fine probably from the $10,000 transferred to her and Bell Rowland, his supplier, paid the second fine and costs in the sum of $203.50. He *admitted* and never denied that he sold the whiskey or that he wasn't guilty of the offenses charged in the warrants. Appellant said, "Fact is, I am an alcoholic myself and I just sold enough to stay drunk myself" (TH, p. 18). He further admitted

to selling liquor on Sunday on each of the charges (TH, p. 18). He admitted he had no license to sell.

Indeed there was little, if any, need for him to employ counsel if he intended to abstain from a repetition of the offense since he received the lowest possible fine under the law for the first two bootlegging offenses charged. He had obviously plea bargained on the basis of pleas of guilty and had the minimum funds ready to pay the minimum fine.

The first offense case was set for trial on October 9, 1963, and was passed for a jury trial on October 21, 1963. When the case came on for trial the minimum fine and court costs were assessed. against petitioner/appellant. He deliberately waived counsel and trial by jury.

Appellant, understandingly, knowingly, premeditatedly, willingly and intelligently waived counsel and accepted the fines on each of the occasions. The cases cited and retroactivity which he seeks in the instant case *all came after* 1964. He now maintains that on those occasions his Sixth Amendment rights were violated.

In *Argersinger v. Hamlin, supra,* the Court said:

> "The standard seeks to distinguish those cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no likelihood."

Had the conditions been as appellant contends and had he observed the law there couldn't have been the slightest likelihood of any inconvenience to the petitioner/appellant from the disposition of the misdemeanor charges on a plea of guilty.

Petitioner/appellant declined to follow his previous practice of past years by having counsel and waived a trial by jury. This case isn't a matter of presuming waiver of counsel from a silent record. The action of the defendant and the testimony from the hearing is abundantly clear and speak for themselves.

Petitioner/appellant's two pleas of guilty in the circumstances were voluntarily, intelligently and understandably made and there was no error in the U.S. District Court finding. See *Evans* v. *Swenson,* 371 F. Supp. 1101 (1944).

Petitioner/appellant may have made only a meagre living by bootlegging in and around Daviess County, Kentucky, but the statutory was intended to correct habitual liquor law violations and his conviction on manslaughter indicates that his offenses were by no means trival.

CONCLUSION

For the reasons set forth herein, the Respondent/appellee prays that the petition for a writ of certiorari should be denied and for all other relief to which this Court may deem the respondent entitled.

Respectfully submitted,

ROBERT F. STEPHENS
Attorney General

/s/ *Guy C. Shearer*

GUY C. SHEARER
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Telephone (502) 564-7600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

Pursuant to Rule 33 (1) and (3) (b), of the Rules of the Supreme Court of the United States, I certify that three true and exact copies of the foregoing Petition for a Writ of Certiorari were mailed to the Hon. John D. Miller, 218 Masonic Building, 227 St. Ann Street, Owensboro, Kentucky 42301 (he being counsel of record for the Petitioner/appellant) with proper postage attached thereto, on this 8th day of August, 1977.

Guy C. Shearer
Guy C. Shearer
Assistant Attorney General
P.C.

APPENDIX

OPINION AND JUDGMENT OF STATE COURT

COMMONWEALTH OF KENTUCKY
DAVIESS CIRCUIT COURT
DIVISION II

ERIN ROBERT RUSSELL		**PLAINTIFF**
VS	**OPINION AND JUDGMENT**	**NO. 18086**
COMMONWEALTH OF KENTUCKY		**DEFENDANT**

This matter is before the Court on Erin Robert Russell's petition under R. Cr. 11.42 and C. R. 60.02. He seeks to void two misdemeanor convictions in the Owensboro Police Court and to void the conviction for the "third offense of selling alcoholic beverages without a license" and also voiding the conviction for voluntary manslaughter rendered by a jury in the April, 1974 criminal term of court. He was sentenced to life imprisonment under the Habitual Criminal Statute for the last named offense. The thrust of his argument is that the record is silent as to whether or not he had counsel at the two misdemeanor convictions; and he testified that he, in fact, did not have counsel. At both of the misdemeanor convictions he paid a fine only and received no jail sentence.

The Court is of the opinion that the law does not now require nor did it at the time of the two misdemeanor convictions require the presence of an attorney in the absence of a sentence depriving a defendant of his freedom.

JUDGMENT

For the reasons indicated the relief sought is denied

and the petition is dismissed with costs to the petitioner. This the 7th day of March, 1975.

/s/ Robert M. Short

Judge, Daviess Circuit Court
Division II

Copies Mail To:

Hon. John D. Miller
Attorney for Plaintiff

Hon. Stewart B. Elliott
Assistant Commonwealth Attorney

RENDERED: OCTOBER 17, 1975

COURT OF APPEALS OF KENTUCKY

75-269

ERIN ROBERT RUSSELL — **APPELLANT**

V.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE ROBERT M. SHORT, JUDGE
INDICTMENT NO. 18086

COMMONWEALTH OF KENTUCKY — **APPELLEE**

MEMORANDUM OPINION PER CURIAM

AFFIRMING

It is the opinion of the Court that the judgment should be and it is affirmed.

All concur.

Attorney for Appellant:

John D. Miller
Miller, Taylor & Burlew
218 Masonic Building
227 St. Ann Street
Owensboro, Kentucky 42301

Attorney for Appellee:

Ed. W. Hancock
Attorney General

Guy C. Shearer
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

MEMORANDUM

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

ERIN ROBERT RUSSELL, **Petitioner**	)	
v.	)	**NO. C-76-0046-0(G)**
HENRY E. COWAN, WARDEN, **Respondent**	)	

M E M O R A N D U M

This matter concerns a petition for writ of habeas corpus filed by petitioner, an inmate at the Kentucky State Penitentiary, with the assistance of retained counsel. Petitioner is now serving four consecutive sentences totaling fourteen (14) years, but the one in dispute here is a life sentence imposed in the Daviess Circuit Court on May 21, 1974, which is to be served after completion of those fourteen (14) year sentences. Petitioner was tried on a murder charge and for being a habitual criminal with two prior felony convictions (knowingly receiving stolen property and third offense selling alcoholic beverages without a license). He was found guilty of voluntary manslaughter and of being a habitual criminal[1] with

[1] KRS 431.190 Any person convicted a second time of a felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

two prior felony convictions, the latter two being the basis for the life sentence instead of twenty-one years as a conviction only of voluntary manslaughter would have permitted.

The primary contention is that the habitual criminal conviction is based on a tainted prior felony conviction. He claims that the felony conviction of selling alcoholic beverages without a license third offense) is constitutionally infirm because the two prior misdemeanor selling offenses, necessary predicates to make the third like offense a felony,[2] were obtained without the benefit of counsel. He testified at an RCr 11.42 hearing on this issue that at the time he entered pleas of guilty to those misdemeanors in police court on October 21, 1963, and January 13, 1964, he did not have counsel, was not aware that he could have counsel, and could not have afforded to employ counsel had he so know (Transcript of Hearing 16, 17, 26). The police records do not show that counsel was present either occasion.

Petitioner is a fifty-seven year old man with a long criminal history. We note that only as it may be relevent to petitioner's assertion that he was unaware in 1963 and

[2] KRS 243.990(2) provides for a fine of not less than $100.00 nor more than $200.00, or imprisonment in the county jail for not more than six months, or both, for the first offense. For the second offense, the punishment is a fine of not less than $200.00 nor more than $500.00, or imprisonment in the county jail for not more than six months, or both. For the third offense and each subsequent offense, the punishment is a fine of not less than $500.00 nor more than $5,000.00, or imprisonment in the penitentiary for not more than five years, or both. Thus, the third offense constitutes a felony under Kentucky law.

1964 that he was entitled to counsel, as well as his alleged financial inability to employ counsel, to be discussed later. Petitioner's troubles began in 1945 and until the critical time herein in question, 1963, he had appeared in court at various times on charges of unlawful assembly, carrying a concealed weapon, assault with a deadly weapon, drunk and disorderly, common nuisance, drunk, wreckless driving, failing to render aid, and storehouse breaking. It appears that he was able to have the felony charges amended to misdemeanors for disposition, and on at least three occasions between 1945 and 1963 he was represented in court by retained counsel (assault with deadly weapon in 1945, and at a trial on storehouse breaking charges resulting in a hung jury, and he later pleaded guilty to a reduced charged in 1961). Thereafter on:

> October 7, 1963, he was charged in police court with selling alcoholic beverages without a license (first offense) K.R.S. 243.020, the punishment for which is provided in K.R.S. 243.990(2). October 16, 1963, he was indicted for knowingly receiving stolen property and carrying a concealed weapon. He was represented by a retained attorney. October 17, 1963, he pleaded guilty to an amended charge of assault and battery. The other charge was continued to April 1964 term and he was placed on bond. October 21, 1963, petitioner pleaded guilty to the October 7 charge and received the minimum fine, which was paid. The record makes no reference to counsel, and petitioner testified at a 1975 (RCr 11.42 hearing that he did not know he could have counsel, and could not afford to hire one anyway. January 13,

1964, he pleaded guilty to selling alcoholic beverages without a license (second offense), and the recidivist aspect of the statute was applied, and the increased, but again minimum, fine was imposed and paid. Again the record is silent as to counsel, but petitioner testified at the RCr 11.42 hearing that he did not know he had a right to counsel, and could not afford to hire one anyway.

March 1964, petitioner, represented by counsel, was acquitted of a charge of selling without a license (third offense). April Term 1964, petitioner, represented by counsel, pleaded guilty to the reducd charge which had been continued over from October 17 court appearance.

August 14, 1964, represented by counsel, he pleaded guilty to contributing to the delinquency of a minor, and paid a fine. February 19, 1965, represented by counsel, he was convicted of two counts of knowlingly receiving stolen property for which he received five-year consecutive sentences on each. The conviction was appealed and affirmed. *Russell v. Commonwealth*, Ky., 403 S.W. 2d 694 (1966). August 31, 1965, represented by counsel, he was convicted of selling alcoholic beverages (third offense and thus a felony) and operating a game of chance, and sentenced to three and one-year terms, respectively, consecutive to each other and consecutive to the terms imposed February 19, 1965. The conviction was appealed and affirmed. *Russell* v. *Commonwealth*, Ky., 405 S.W. 2d (1966). No issue was raised on this appeal that the selling felony conviction was tainted by the two

prior misdemeanor selling convictions. December 1969, he was paroled.

January 1974, he was indicted for murder and as a habitual criminal with two prior felony convictions (February 1965 stolen property convictions, and selling alcohol third offense August 1965).

April 1974, petitioner's retained counsel filed a Petition for Writ of Prohibition and Mandamus in which he urged that the habitual criminal statute cannot be used to enhance the punishment to life when the primary charge (murder) already carries a life penalty, and further that the third offense selling charge, made a felony only because of two prior misdemeanor selling convictions, is not a "true felony" for the purpose of enhancing punishment under the recidivist statute, and thus that the indictment should be quashed, or in the alternative he should be afforded a bifurcated trial. No claim was advanced that the third selling offense resulting in the felony conviction was in any way defective. See unnumbered page 3 of Exhibit C to the instant petition where counsel states in that petition to the state court that ". . . petitioner does not attack the validiy of his prior convictions . . ." The petition was denied.

May 1974, petitioner was tried on the charges in the indictment returned in January. He was convicted of voluntary manslaughter and of being a habitual criminal because of the two prior convictions, and sentenced to life as authorized by the recidivist statute. The manslaughter charge alone would authorize only twenty-one years. (The uncontested

prior conviction of knowingly receiving stolen property would have authorized double punishment on the principal charge). This conviction was appealed and on January 31, 1975, it was affirmed.

January 1975, while the above appeal was pending, petitioner's counsel filed a motion in the trial court to vacate under RCr 11.42, collaterally attacking for the first time the validity of the third selling offense in 1965 which resulted in one of the prior felony convictions, urging that petitioner was without counsel when he received his first two misdemeanor selling convictions, and thus they were improperly used to enhance the third selling offense into a felony. Following an evidentiary hearing, a transcript of which has been filed with this record, his motion was denied.

October 1975, the denial of his motion to vacate was affirmed on appeal.

March 1976, this petition for writ of habeas corpus. We have pending before us at this time motions by petitioner's counsel for a pretrial conference and an evidentiary hearing. Because we are of the opinion that the issues are adequately framed by the pleadings and the many exhibits attached thereto, and the fact that the Transcript of the RCr 11.42 hearing filed with this record afforded him a full, fair and adequate hearing for a determination of the factual issues involved, we deny these motions. *Townsend* v. *Sain*, 372 U.S. 293 (1963).

Petitioner relies mainly upon *Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006 (1972), quoting therefrom that

"absent a waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at trial." The records of the police court show neither presence of counsel, nor waiver thereof, when he pleaded guilty to the two misdemeanor selling charges in October 1963 and January 1964. He asserts that these two uncounselled misdemeanor convictions were pyramided into a felony conviction which later was used to support the recidivist conviction, and thus he is serving a life sentence as a direct result of those two uncounselled misdemeanor convictions.

There is no contention that *Argersinger* was violated at the time he was fined and not jailed on the two misdemeanor counts, only that when they are subsequently relied on in part to establish past criminal conduct in support of a habitual criminal charge and confinement, does *Argersinger* require that they be disregarded.

We do not reach that question. It cannot be said that every uncounselled conviction is, per se, invalid In fact, in *Argersinger* it was specifically stated that it was the "denial" of counsel not the waiver thereof which was condemned. (P. 37). Had the police court records shown a conscious and voluntary waiver of counsel. no question of this variety about the present habitual offender conviction would be presented. The fact that those records are silent, however, does not require us to find that he was denied counsel, because the fact of waiver may be established by the state at a subsequent hearing such as was held herein on the RCr 11.42 motion to vacate.

Petitioner's self-serving testimony that on the two

occasions is question he did not know he had the right to counsel, did not waive assistance of counsel, and even if he did he could not have retained counsel, is clearly refuted by the facts. We know not why he on these occasions chose not to have the assistance of counsel, but we surmise that he was well aware that he was going to pay the minimum fine as a bootlegger and did not see the need for counsel, and did not then anticipate the ultimate significance of these convictions to a later habitual criminal charge, just as many others in similar situations may not anticipate how a conviction may later haunt them. Their failure to anticipate the full range of the consequences of a conviction, however, does not insulate them from those consequences. Petitioner made his choice. It strains credulity beyond the breaking point that he did not know he could have counsel, when on at least three prior excursions into the courts he had retained counsel. In fact, on October 21, 1963, and on January 14, 1964, when he pleaded to the two misdemeanor selling charges for the minimum fines he was then represented by retained counsel on another charge. When he was faced with a third selling charge in March 1964, aware of the immediate significance of a third conviction, he retained counsel and was successful in getting acquitted. The pattern is clear-when he felt it advantageous, he retained counsel. When he could get off cheaply, he didn't.

Could he afford counsel on these two occasions He was employed (TH 22). He had received $10,000.00 from his mother for his interest in his deceased father's farm. (TH 25). He owned some old cars. He always paid his fines. He could appeal his felony convictions.

When he needed counsel, he retained one. We conclude that all these circumstances establish that on the occasions in question petitioner was aware that he could have the assistance of counsel and could have retained one, but for his own reasons chose not to do so.

Petitioner next contends that his Fifth and Fourteenth Amendment rights were violated when he was asked on cross-examination why he did not claim self defense when he was arrested. He correctly cites *United States* v. *Hale*, 422 U.S. 171, 95 S.Ct. 21 33 (1975) and *Doyle* v. *Ohio*, U.S. , 96 S.Ct. (1976) for the proposition that the constitution is offended by the impeachment of a defendant by his post-arrest silence and after receipt of the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The facts in the petitioner's case, however, do not square with those in either *Hale* or *Doyle*. In each of the latter cases, the defendants, after receiving their Miranda warnings, exercised their rights to remain silent and made no statement. The court held that their "silence" could not be used against them, but, in *Doyle*, however, the court noted.

> "It goes almost without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. *Cf. United States* v. *Fairchild*, 505 F.2d 1378, 1383 (CA5 1975)." N.11

If silence can constitute behavior which can be used to impeach, certainly an inconsistent statement made after full advice as to rights, can be so used. Our petitioner did not elect to exercise his right to remain silent. Instead, all he "want(ed) to do is tell exactly what happened. . . ." (Unnumbered page 10, line 6, Petitioner's Memorandum of Point and Authorities). A fair characterization of his statement made to the police is that the killing was accidental - he pulled his gun to "scare him", and "the damn thing went off." The thrust of his trial testimony was toward self defense - that he was "terrified." He was asked on cross-examination why he had not offered this explantion to the police, impliedly rather than the accident version. He was impeached, not by his silence to which he had a constitutional right, but by his inconsistent explanation made after he voluntarily waived his right to remain silent. We hold this to be proper, and not contrary to either the Fifth or Fourteenth Amendment.

The next contention is that petitioner's Sixth Amendment rights were violated when he was not permitted to call witnesses to testify to decedent's bad reputation for keeping the peace. The petitioner did not know the victim, so he was unaware of the victim's reputation at the time he shot him. Under *Wooten* v. *Commonwealth*, Ky., 478 S.U. 2d 701 (1972) such evidence is not available to a defendant who is not aware at the time of the event that the victim has such a reputation, although respondent concedes that it might be admissible if there exists an issue as to which party was the aggressor. There was no dispute that the victim hit petitioner first and that the latter then pulled his gun and it discharged.

The question of admissibility of evidence is for the states and is not reviewable on federal habeas corpus unless there is an error of such magnitude so as to deny fundamental fairness. *U.S. ex rel Clark* v. *Fike,* 538 F. 2d 750 (7th Cir. 1976). It is clear that the victim was the aggressor. That he was denied the right to call witnesses to expand on the uncontradicted aggressor issue could not have denied him fundamental fairness.

The final issue also deals with an uncounselled prior conviction. In his statement to police officers following his arrest for the killing which resulted in him being charged with murder, petitioner expanded on the accident version by attempting to explain his unfamiliarity with guns. He stated, "I never fired a gun or nothing before in my life, and (sic) fact I never carried a gun." (Exhibit K). The commonwealth's attorney was permitted to counter this explanation by eliciting from petitioner his admission that in August 1945 he had pleaded guilty to carrying a concealed deadly weapon in police court, and had been indicted for assault with a deadly weapon which was reduced to breach of the peace, and to which reduced charged he pleaded guilty. He explained that on the former charge, another person actually owned the weapon. (Unnumber page 15, Petitioner's Memorandum of Points and Authorities). He alleges that when he pleaded guilty to the first charge, and at the preliminary hearing in police court on the felony charge, he was without counsel, not having been advised of his right thereto, did not waive same, nor was he financially able to retain counsel. He did have counsel when the latter charge was reduced. (TH 27-29).

While we recognize that petitioner has the burden of establishing that he did not waive, and could not afford counsel, respondent has not challenged this assertion, and in fact did not respond to this issue. For the purposes of disposing of this issue, we will assume the truthfulness of those assertions.

Petitioner directs no complaint to the testimony concerning his appearance in court, represented by counsel, when the charge of assault with a deadly weapon was reduced to the misdemeanor charge to which he pleaded guilty. We believe that under the circumstances herein that any reference to his uncounselled apparance at the prliminary hearing and to the concealed weapon charge, explained away as it was, even if error, was harmless error beyond a reasonable doubt and did not deprive him of due process. *Cf. Thomas* v. *Savage,* 513 F.2d 536 (5th Cir. 1975).

Accordingly, we find petitioner's claims to be without merit, and a separate judgment will be entered dismissing the petition.

Date: 10/15/76

/s/ *James F. Gordon*

James F. Gordon
Senior District Judge

ENTERED OCTOBER 15, 1976

August Winkenhofer, Jr. Clerk
By /s/ *Betty Bruton*
Deputy Clerk

Copies to:

Erin Robert Russell, Petitioner

Counsel for Petitioner

Attorney General, Commonwealth of Kentucky

United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

CIVIL ACTION FILE NO. 76-0046-0

ERIN ROBERT RUSSELL,	)	
Petitioner,	)	
	)	**JUDGMENT**
vs.	)	
	)	
HENRY E. COWAN, WARDEN	)	
Respondent	)	

This action came on for trial before the Court, Honorable James F. Gordon , United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged, pursuant to the Memorandum of this day, that petitioner's Petition for Writ of Habeas Corpus be, and the same is hereby, dismissed and this action is removed from the docket of this Court.

Dated at Owensboro, Kentucky , this 15th day of October, 1976.

/s/ *August Winkenhofer, Jr.*
Clerk of Court

ENTERED BY:
/s/ *Betty Bruton*
Betty Bruton, Deputy Clerk

OCTOBED 15, 1976
August Winkenhofer, Jr. Clerk
By /s/ *Betty Bruton*
Deputy Clerk

NO. 76-2622

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED APRIL 21, 1977

ERIN ROBERT RUSSELL **Petitioner-Appellant**	:	**JOHN P. HEHMAN,** **Clerk**
v.	:	**ORDER**
HENRY E. COWEN, WARDEN **Respondent-Appellee**	:	

Before: PECK and LIVELY, Circuit Judges, and GUY,* District Judge.

Petitioner-appellant perfected this appeal from an order of the district court denying his petition for a writ of habeas corpus. In said petition petitioner-appellant contends that his conviction in a Kentucky state court of being a habitual criminal is constitutionally flawed because one of the prior convictions relied upon was in turn based on his third conviction for selling alcoholic beverages without a license. That offense is a misdemeanor under Kentucky law, which further provides, however, that the third such conviction shall constitute a felony. Appellant was represented by counsel at such third trial, but was not represented at either of the first two such trials. It is concluded that since appellant did not raise this issue as a defense in the third such trial

he may not be heard to raise it here. It being further concluded that no violation of any constitutional right arose out of a cross-examination herein challenged, and that appellant's other contentions on appeal are without merit.

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

John P. Hehman, Clerk of Court

*

Honorable Ralph B. Guy, Jr., United States District Judge for Eastern District of Michigan, Southern Division, sitting by designation.